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No. 89, Original

In the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF CALIFORNIA, EX REL.
STATE LANDS COMMISSION, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON CROSS-MOTIONS FOR JUDGMENT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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This supplemental brief is submitted pursuant to leave granted by an Order of March 8, 1982. Although reluctant to burden the Court with more paper, we deem it necessary to make a last attempt to narrow, or at least clarify, the issues. Unfortunately, the shifting focus of both parties' submissions to date—not to say outright changes of position [1]—has produced a confection far more

[1] Thus, neither party any longer relies on the largely submerged status of the parcel in suit at statehood as dispositive. For our part, we abandon any suggestion that the accretions which occurred over what was, at the time, federal seabed, are, for that reason alone, federal lands today. On the other hand, we continue to assert the relevance of federal dominion over the formerly submerged area in rebutting California's claim to that acreage as "sovereign State land" since statehood.

difficult to identify than the relatively straightforward Linzer and Sacher tortes mentioned in recent briefs. Viewed as a whole, the disparate arguments now before the Court may rightly be seen as serving up a most unappetizing "pudding without a theme". We have accordingly conscripted our best pastry chefs to concoct what is, we hope, a more palatable dessert.

A. INTRODUCTION

1. At the outset, it is appropriate to stress the historic geographical facts underlying this controversy. Although these have never been in dispute, California's most recent filing might be read as suggesting that the whole of the parcel in suit was, until the jetties had their effect, "tidelands" lying between the high and low water lines. That is not the true situation, as the State's pleadings make clear.

When California submitted its Motion for Leave to File to this Court, the land in dispute was described as an area that had been, at the time the State was admitted to the Union (in 1850), "part of the bed of the Pacific Ocean" (Motion for Leave at 6, 7). Elsewhere in the same filing, there were references to the disputed parcel as formerly "tide and submerged lands" of the State (*id.* at 15, 28). Thus, while the relative proportion of former submerged lands and tidelands was never stated, it appeared that some acreage of each type was involved. Moreover, the Exhibits submitted by California indicated that most of the area was fully submerged until the jetties were constructed at the turn of the last Century, and the State has never challenged our repeated statement to that effect.[2]

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[2] See Memorandum for the United States (Aug. 1981) 1-2; Motion of the United States for Judgment on the Pleadings and Supporting Memorandum (Nov. 1981) 1-2; Brief for the United States (Jan. 1982) (hereafter "U.S. Op. Br.") 2-3; Reply Brief for the United States (Feb. 1982) (hereafter "U.S. Rep. Br.") 4.

2. California now asserts that, "[n]ecessarily, no deposition [of alluvion] could or did take place on submerged lands. All depositions occurred on tidelands owned by California under the Equal-Footing Doctrine" (Cal. Rep. Br. 2; see, also, *id.* 4-7). We are not clear whether this purports to be a proposition of law or a statement of fact. We shall address the legal theory in a moment. But we must immediately question the assertion insofar as the State may be intending to describe a physical process.

It is common ground that the parcel in suit, a major part of which was once wholly submerged, ultimately became upland through sand deposits carried downcoast by wave action, the normal drift further south being deflected by the North Jetty shielding the channel into Humboldt Bay. Presumably, some of the sand was deposited on the then submerged seabed, some on the beach or tidelands area, and some on the edge of the upland coast. Conceivably, the typography was so evenly sloping and the process so regular that every portion of the former seabed passed through a stage of becoming tideland before it ultimately took on the character of upland. But that is far from certain and plainly not demonstrable. For all we know, there were places—most likely along the jetty itself—where upland met submerged land without any intervening tideland and sufficient deposits occurred at one time to transform seabed into upland in one step. Or it may be that sandbars formed seaward of the low water line of the mainland and were later connected to the land mass. At all events, we cannot suppose that the result turns on such unknowable complexities.

3. It is plain that California did not, until its latest filing, rely on any distinction between former submerged lands and former tidelands, or on any claim that State title attached when the seabed assumed the character of tidelands. On the contrary, in its Complaint and supporting argument, California asserted title to the entire

parcel—including then seabed—as vested *at statehood.* See Motion for Leave 5-6, 7, 17-18, 28; Cal. Op. Br. 2-3, 10. Only gradually and grudgingly has the State recognized that this Court long ago expressly denied California's title to submerged lands underlying the open sea, even though within the State's political boundaries. See Cal. Op. Br. 15-16, 27-30; Cal. Rep. Br. 4-7.[3] And so we are confronted with a new proposition: that State title, secure against any rule of federal law, vested in respect of the former seabed *when that area passed through a tideland stage before becoming upland.* The present brief is primarily addressed to that contention—which is advanced as wholly independent of the Submerged Lands Act.

The remainder of our submission responds to two arguments made under the Submerged Lands Act:

(1) That accretions to the mainland caused by natural wave and tidal action deflected by artificial works are "made lands" within the meaning of Section 2(a)(3) of the Submerged Lands Act, 43 U.S.C. 1301(a)(3); and

(2) That such accretions to reserved lands of the United States are not encompassed by Section 5 of the Submerged Lands Act, 43 U.S.C. 1313, because State law does not recognize the added lands as natural accretion inuring to the upland owner.

B. THE TIDELANDS ARGUMENT

We have previously addressed California's claim advanced under the Equal Footing Doctrine insofar as it reaches the relatively small portion of the disputed parcel that constituted tidelands *in 1850,* when the State was admitted to the Union. See U.S. Op. Br. 20-24. That

[3] Even now, it is not entirely clear whether California is asking the Court to overrule the holding of the first *California* case or contending that Congress did so in 1953. At all events, we have no occasion here to repeat our rebuttal to any such arguments. See U.S. Op. Br. 6-20.

submission is equally applicable to tidelands off the open coast formed since statehood but which now lie above the high water line. Indeed, to the extent that California's present argument is a logical extension of the *Corvallis* principle of indefeasable State title, there is all the more reason to hold that principle inapplicable along the open seacoast.

1. As we have earlier noted, the Court has never squarely held that the *Pollard* rule embraces tidelands along an open coast. U.S. Op. Br. 20-22. At all events, we have stressed, tentative acceptance of that proposition has been on the understanding that any State title to ocean-fronting tidelands is ambulatory, vested only so long as the area retains the character of tidelands, as defined by a uniform rule. *Id.* at 22-23. So understood, any State claim to the foreshore of the sea under the Equal Footing Doctrine is moot, in light of the identical grant made by the Submerged Lands Act. *Ibid.* We adhere to that submission, which, if correct, requires rejection of any claim to former tidelands that are today part of the upland mass, regardless whether the area involved was tidelands at statehood or only at some later time.

2. There are, however, independent objections to California's new tidelands argument. One obstacle is that, according to *Corvallis* (assuming arguendo it governs on the open sea), the Equal Footing Doctrine—on which California relies—is fully spent at the moment of the State's admission and grants nothing thereafter. See 429 U.S. at 370-371, 376, 378, 381.

As we have said, we do not believe *Corvallis* is applicable here. But, if it were, its explication of the Equal Footing rule would vest in California only areas that were tidelands in 1850, not subsequently formed tidelands. In this respect, the *Corvallis* principle is even-handed: it allows the states to retain lands encompassed by the constitutional grant effected at statehood regardless of subsequent geographical changes; but it limits the benefit of the Equal Footing Doctrine to lands enjoying

the relevant status on the date of admission. California's submission, on the other hand, is far greedier: the State would invoke the Equal Footing Doctrine as conferring indefeasable title to all qualifying lands at statehood and, also, all acreage that, at any later time, meets the test. In sum, as applied to tidelands, California views the Equal Footing principle as condoning an unlimited appetite to acquire all newly formed tidelands without disgorging any part of what ceases to have that character. Thus far, California has only chosen to retain former tidelands whose physical character has been altered by artificial causes, direct or indirect. But, if it is right, nothing prevents the State from insisting on ignoring the effect of wholly natural changes where that would increase its domain—as the State of Washington has purported to do (see *Hughes* v. *Washington*, 389 U.S. 290 (1967)).

The implications of such a rule are perverse indeed. In order to identify State lands along the coast, it would be necessary to plot the high and low water lines not merely at the date of admission to the Union and at present, but also for all intervening times. And, whenever areas now forming accretions to the upland were once part of the seabed, it would be necessary to determine whether, at some point, they were tidelands. Even in the present case, that is not obvious. But the reconstruction would be all the more difficult when the tide is minimal—as in the Gulf of Mexico or off the North Slope of Alaska—or where the seabed at the coast is not a gentle and regular slope.

California's tidelands rule, moreover, is logically inconsistent. If indefeasable State title vests in all areas that were at any time tidelands, that should hold true whether the zone in question later merges with the mainland by accretion or becomes attached to the seabed because of erosion. Yet, California apparently eschews any claim under *Pollard* to tidelands lost to the ocean by erosion, presumably recognizing that the low water line

along the open coast is ambulatory as a matter of federal law. See Cal. Rep. Br. 2, 5-6. To be sure, the concession is mandated by the first *California* decision of this Court. But it highlights the asymmetry of the argument.

3. By attempting to extend *Corvallis*, California has demonstrated that any general principle of indefeasable title is wholly inappropriate to the open seacoast. The rationale of the first *California* case denying State proprietary rights to the seabed cannot co-exist with a State law rule that retains for the State former tidelands now submerged.[4] And there is no better justification for permitting a State to keep like tidelands when the coastline moves seaward and the area becomes upland. Except for the special case of lands deliberately filled in by official action or permission, the only fair and practical solution is to adhere to the time-honored rule which fixes seacoast boundaries where current geographical reality places them. In sum, *both* the low water line and the high water line are ambulatory, as a matter of constitutional law, which no State can vary—except, of course, by relinquishing some part of its tidelands, so defined. California appears to concede as much with respect to the seaward boundary of coastal tidelands, accepting that the low water line is defined by uniform federal law. It is incomprehensible why the Equal Footing Doctrine—assuming it embraces the seashore at all—should not be understood as likewise fixing the landward boundary of the constitutional grant by reference to a uniform ambulatory high water line principle.

4. What has been said demonstrates, we believe, that insofar as California's claim is predicated on ownership

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[4] What is more, any such application of the *Corvallis* view of indefeasable State title to ocean-fronting tidelands would require reconsideration of all the decisions of this Court recognizing exclusive federal rights beyond three miles from the present coast whenever erosion has moved the statehood low water line more than three miles shoreward or has changed the status of what were once inland waters.

of open coast tidelands under the Equal Footing Doctrine, the State cannot expand the grant by locating the high water line more favorably than the uniform federal rule ordains—whether by choosing a higher water line or denying the effect of accretions that federal law recognizes as pushing out the line. Except for the "made land" provision of the Submerged Lands Act, California explicitly asserts no other basis for its present claim. Yet, there is a suggestion in its most recent submission that, independently of the Equal Footing Doctrine, the State is free to apply its own property law rules in fixing the boundary of riparian lands. See Cal. Rep. Br. 17-20. We turn briefly to that proposition.

Presumably, California is here invoking the second holding of *Corvallis*, that Oregon could claim as State lands, unembarrassed by any rule of federal law, a new riverbed "which did not pass under the equal-footing doctrine." 429 U.S. at 378-382. We are not sure we understand this aspect of the *Corvallis* decision, since it seems to recognize unfettered State power to fashion "real property law" in such a way as to appropriate for the State, without compensation, lands which the Constitution does not vest in the State. No doubt, we read the opinion too broadly.[5] But, it is at least clear that the principle has not been extended to the open seacoast. 429 U.S. at 377 n.6. And, at all events, the Court's subsequent ruling in *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979), makes it unnecessary to pursue the *Corvallis* ruling here.

Contrary to California's suggestion (Cal. Op. Br. 20), we read *Wilson* as holding that federal law controls the boundaries of lands held by the United States, whether for the benefit of an Indian Tribe or otherwise. 442 U.S. at

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[5] Indeed, the summary of the *Corvallis* holding given in *Wilson*, *supra*, 442 U.S. at 669-670, seems to restrict it substantially. We remain unclear, however, on what basis Oregon could be said to have acquired title to the new bed of the Willamette River in the formerly dry area of the Fischer Cut if the Equal Footing Doctrine did not convey it. See 429 U.S. at 366-367, 378.

670. While, in some circumstances, "borrowing" State property rules may be appropriate, this is plainly not such a case. There are good reasons for following a uniform federal rule even with respect to private lands bordering the ocean. See *Hughes* v. *Washington, supra.* *A fortiori*, self-serving State rules that would detach federal uplands from the sea ought not be accepted. After all, the United States typically retains or acquires coastal lands for a purpose related to their maritime location. And, in any event (as we explore in a moment), the Submerged Lands Act expressly mandates this result.

C. THE "MADE LAND" ARGUMENT

It is hardly debatable, we submit, that, except for "filled in, made or reclaimed lands," the Submerged Lands Act conveys or confirms to the coastal States an ambulatory title to offshore submerged and tide lands, good only so long as they actually fit that description. In the words of the statute, it reaches—with the exception just noted—those areas which "are", at present, "permanently or periodically covered by tidal waters up to but not above the line of mean high tide," "as heretofore or hereafter modified by accretion, erosion, and reliction." 43 U.S.C. 1301(a). We cannot suppose that a casual footnote in the *Corvallis* opinion (429 U.S. at 371-372 n.4)[6] overturns this express statutory limitation. See U.S. Op. Br. 12-15. Nor can it be seriously contended that Congress meant to leave to each beneficiary State the option to apply its own rules of accretion, erosion and reliction, so as to expand the limits of the grant. *Ibid.* For the purposes of the Act, California can no more rewrite the definition of submerged lands or tidelands by embracing artificially caused accretions than Washington can treat *all* offshore accre-

[6] The cited footnote invokes *Bonelli* for the proposition that the Submerged Lands Act merely confirms the *Pollard* rule for inland waters. That observation was, of course, wholly consistent with the view expressed in *Bonelli* that the Equal Footing Doctrine conveyed only an ambulatory title. At all events, the *Corvallis* footnote does not purport to construe the Act as it bears on coastal rights. See 429 U.S. at 377 n.6.

tions as still under water. So far as any State claims under the Submerged Lands Act, it is restricted by the uniform definitions there announced. And, finally, it seems obvious that this federal statute uses the terms "accretion" and "high water line" as they have always been understood in federal law, *i.e.*, as giving the same effect to all gradual changes of the upland boundary, regardless of cause. See U.S. Op. Br. 14-15.[7] Accordingly, it is not surprising that, when it invokes the Submerged Lands Act, California focuses on the one exception to the rule, the "made land" provision.

We have not heretofore argued the point because it seemed self-evident that the accretions at issue do not qualify as "filled in, made, or reclaimed lands," within 43 U.S.C. 1301(a)(3). Even California does not assert that the gradual accretions to the mainland resulting entirely from natural wave and tidal action, albeit deflected by an artificial structure, constitute "filled in" or "reclaimed" lands. And it is a little startling to suggest that the intervening term "made" carries a wholly different meaning. In this context at least, one would most reasonably read "made" as connoting man-made lands, not naturally formed accretion.

To so read the term "made," in accordance with the canon *ejusdem generis*, is not necessarily to condemn it as surplusage. It may have been thought that "filled-in" described only a dumping or pumping in of sand or earth to extend the shore (as was common, for instance, to create or enlarge many recreational beach areas), and that "reclaimed" connoted the draining of shallow areas (as in Florida). Thus, a further word arguably was

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[7] Indeed, Section 1301(a)(3), by its terms, suggests that Congress viewed even wholly artificially filled-in land as "accretion" within subsection (1), and as moving seaward the "high water line," as that term is used in subsection (2). As California itself stresses (Cal. Rep. Br. 2, 5), the Court has expressly held that such artificial additions, labelled "accretions," push out the low water line. *United States* v. *California*, 381 U.S. 139, 176-177 (1965).

required to cover "man-made" harborworks and other artificial structures jutting out to sea. On the other hand, the additional term may simply have been inserted out of abundance of caution, regardless of need. That would not be out of character in a statute so full of redundancies. A sufficient example is Section 3 (43 U.S.C. 1311) where it is "determined and declared" that "title to and ownership of" submerged lands be "recognized, confirmed, established, and vested in" the States or their grantees, and, for good measure, the United States "releases and relinquishes" to them all its "right, title and interest."

We need not resolve the question whether those who included "made lands" in Section 1301(a)(3) were careful or merely cautious. What seems evident on the face of the text is that this insertion was not intended to accomplish a radical change. Any doubt on this score is dispelled when we examine the legislative history of the provision.

2. The story of the Submerged Lands Act is a long one, full of twists and turns, sometimes very difficult to follow. Fortunately, however, the particular provision at issue has a relatively clear pedigree, directly traceable to a single concern that never varied.

Beginning in 1937, the United States began to assert, at first tentatively, a claim to the marginal seabed and its natural resources. See, *e.g.*, S. Rep. No. 133, 83d Cong., 1st Sess. 54-55 (1953). Legislation was sought in 1938 and 1939 to establish a national petroleum reserve of the area and to authorize litigation to vindicate federal title. *Ibid.* Although these measures failed of enactment, the affected States reacted promptly. From the first, concern was expressed that the federal government, in claiming offshore submerged lands, was questioning the title of States and local authorities to formerly submerged areas artificially reclaimed from the sea by land-fill or the erection of coastal structures. This prospect was, of course, disturbing to many States that were otherwise little interested in the marginal sea issue, and therefore created a much larger constituency for legislation quieting

State claims. See, *e.g.*, *Hearings on S.J. Res. 48 and H.J. Res. 225 Before the Senate Comm. on the Judiciary*, 79th Cong., 2d Sess. 58, 67, 69, 74, 75, 206, 212-213, 215 (1946). Accordingly, the initial proposals submitted as early as 1945 included an express provision confirming State title to former submerged and tide lands "which have been filled or reclaimed." *E.g.*, H.R.J. Res. 225, 79th Cong., 1st Sess. (1945).

The same basic formula, justified by the same fears, appears in all subsequent proposed legislation directed to quieting State title to submerged lands. Indeed, the apprehensions were increased when this Court made express reference in its 1947 decision to "improvements [that] have been made along and near the shores at great expense to public and private agencies," some assumed to be "within * * * the boundary of the marginal sea." *United States* v. *California*, *supra*, 332 U.S. at 40. Nor did the Department of Justice successfully allay those fears by proposing legislation that would confirm any existing right to the "*use*" of such artificial structures and the "*surface*" of "filled in or reclaimed land." See, *e.g.*, S. 2222, 80th Cong., 2d Sess., Section 101 (1948). Understandably enough, this partial disclaimer did not satisfy all potentially affected States, since the United States continued to assert title to the underlying land and mineral resources, as this Court later noted. See *United States* v. *California*, *supra*, 381 U.S. at 176. Accordingly, the proponents of State title continued to insist on a provision that would quiet in the State or its grantees former submerged lands now "filled or reclaimed." *E.g.*, S. 1988, 80th Cong., 2d Sess., Section 2(a) (1948).

3. Two critical points must be stressed. First, the purpose of all these provisions—progenitors of Section 1301 (a) (3)—was to confirm the title to "improvements" made *by the State* or under its authority—not *federal* structures or land-fill projects. This alone exempts the disputed parcel, formed by accretion indirectly resulting from

jetties erected by the United States. See Point D, *infra*, pages 16-18.

More important, however, is the exclusive concern of the provisions (as their text makes clear) with extensions to the mainland directly and deliberately created by artificial means. Typically, the States and their subdivisions were worried about the status of areas reclaimed from the sea by drainage and fill (as in Florida) or discrete additions to the coast created by land-fill or artificial structures for harbors or airports or recreational or industrial uses. See, *e.g.*, *Hearings on S.J. Res. 48, etc., Before the Senate Comm. on the Judiciary, supra*, at 58, 67, 69, 74, 75, 206, 212-213, 215; S. Rep. No. 1592, 80th Cong., 2d Sess. 24-25 (1948).

The reason for this narrow focus is simply that there never was any dispute over gradual accretions indirectly attributable to jetties or like structures. Indeed, the United States at all times asserted—even when against its interest—that such additions to fast lands, like wholly natural accretions, inured to the upland owner and ceased to qualify as submerged lands. See, *e.g.*, Brief for the United States Before the Special Master in No. 6, Orig., O.T. 1951, *United States* v. *California* (May 1952), at 161-163. And California agreed that this "Federal rule" should govern, rather than the "exceptional California view." Brief in Relation to Report of Special Master of May 22, 1951, in the same case (July 1951), at 90-92.[8] See, also, Report of the Special Master under Order of December 3, 1951, in the same case (Oct. 1952), at 44. There was accordingly no occasion legislatively to settle the matter: it being accepted on both sides that all gradual accretions had the same effect, whether ultimately attributable to artificial or wholly natural causes, the only difference Congress had to resolve was with respect to

[8] Because of its special eloquence in arguing the appropriateness of following the federal rule in this context, we reproduce as an appendix the relevant pages of this California brief. *Infra*, pages 1a-4a.

wholly artificial State-sponsored extensions of the mainland into formerly submerged or tidal areas.[9]

4. The only remaining question is whether Congress expanded the reach of the provision to cover our case when it added "made lands" to those "filled in" and "reclaimed" in what became Section 1301(a)(3). Every indication is that no such result was intended.

The word "made" was first inserted into the otherwise familiar provision by a bill introduced by Congressman Walter in 1950. H.R. 8137, 81st Cong., 2d Sess., Section 2 (a)(2) (1950). Far from highlighting this addition as significant, the report on that measure describes it as "in substance, the same as" earlier proposals omitting the term. H.R. Rep. No. 2078, 81st Cong., 2d Sess. 3 (1950). At next session, a number of similar bills were introduced, some including "made lands" and some not, without any apparent focus on the difference. Compare H.R. 58, H.R. 1089 and H.R. 1230, with H.R. 415, H.R. 1310, H.R. 1523 and S. 940, all 82d Cong., 1st Sess. (1951). The House Committee took up the new Walter bill (H.R.

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[9] Although Section 1301(a)(3) plainly confirmed title in the State or its grantees to such areas as of the date of the Submerged Lands Act, the United States continued (erroneously) to challenge the State's claim to subsequent artificial extensions or at least to treating them as part of the baseline from which the 3-mile grant of submerged land should be measured. That is the point decided in California's favor by this Court in 1965. See 381 U.S. at 176-177. But, contrary to the State's present submission, that ruling did not remotely speak to the issue now before the Court. First, although the Opinion refers to "artificial accretions," the only areas in dispute comprised filled-in land or harbor works. Moreover, as the passage makes clear, the Court was addressing only situations in which "*a State* extends its land domain by pushing back the sea" (*id.* at 177, emphasis added), not *federal* improvements, or accretions to reserved lands of the United States, as here. And, finally, the only issue actually before the Court was not ownership of the mainland extensions, but, rather, whether these affected the "low water line" from which California's Submerged Lands Act grant should be measured.

4484, 82d Cong., 1st Sess. (1951)), identical to H.R. 8137 of the previous session and therefore containing the word "made." After amending it in other respects, the Committee reported it favorably, again without treating the insertion of "made lands" as worthy of comment. See H.R. Rep. No. 695, 82d Cong., 1st Sess. 4, 19 (1951). Thereafter, in the Senate, Senator Holland "literally lifted" the relevant provisions of the Walter Bill as a substitute for his own measure (S. 940, 82d Cong., 1st Sess. (1951), which had not included the term "made." See 98 Cong. Rec. 3349 (1952). But neither the sponsor, nor anyone else, commented on the "made land" addition. Indeed, immediately after this action, Senators continued to speak of the importance of confirming State title to "built lands," "filled lands," "filled in lands," and "reclaimed lands," without using the term "made" or suggesting any wider category of added lands that required attention. *E.g.*, 98 Cong. Rec. 3351, 3358, 3366 (1952). Shortly thereafter, this Holland Bill (redesignated S.J. Res. 20, as amended, 82d Cong., 2d Sess. (1952))—with "made lands" included—passed both Houses, and was vetoed by President Truman in 1952. See S. Rep. No. 133, *supra*, at 23. Henceforth, the comparable proposals included the word "made." *E.g.*, S.J. Res. 13, 83d Cong., 1st Sess. (1953); S. 294, 83d Cong., 1st Sess. (1953). And, of course, the measure enacted in 1953 referred to "made lands."

Thus, the words now invoked were before Congress for more than two years. Yet, so far as we have been able to determine, no Member of either House at any time ever suggested that this language effected any substantive change. Nor did the United States ever alter its position that accretions of the kind now in question, as a matter of governing federal law, inured to the upland proprietor and ceased to qualify as submerged lands.

Against this background, it would be wholly extravagant to give significance to the occasional casual remark of a witness or legislator describing naturally formed ac-

cretion as "made."[10] See Cal. Rep. Br. at 9. So far as has been discovered, no Member of either House suggested that Section 1301(a)(3) reached such accretion, even if ultimately attributable to artificial works. See 42 Op. Att'y Gen. 241, 250 (1963). Congress simply was not addressing the question of title to areas no longer washed by the sea, except only for deliberate man-made extensions encroaching on the former seabed—the only "upland" areas ever in controversy.

In sum, California cannot rely on the Submerged Lands Act as granting or confirming its claim to the parcel in suit. On the contrary, as we now demonstrate, the Act expressly rejects such an assertion where the United States is the upland owner.

D. THE SECTION 5 ARGUMENT

California makes a two-fold response to our suggestion that Section 5 of the Submerged Lands Act (43 U.S.C. 1313) confirms federal title to the area in dispute. See Cal. Rep. Br. 13-15.

1. The State's first point is that the land in suit was not "filled in, built up, or otherwise reclaimed by the United States for its own use." *Id.* at 13-14. We agree. However, we do assert that the words "filled in, built up, or otherwise reclaimed," as used here, were intended to cover the same ground as "filled in, made, or reclaimed lands" in Section 1301(a)(3). Thus, if (contrary to our primary submission) our parcel is included by the latter provision, it is excluded by the former. This is, indeed, how the Attorney General explained this new clause of Section 5 which his Department had drafted. See *Hear-*

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[10] California cites the testimony of Commissioner Moses of New York and Senator Daniel's later comments on his testimony. Cal. Rep. Br. 9. In fact, Mr. Moses was almost exclusively speaking of deliberately filled shore land. See *Hearings on S.J. Res. 13, S. 294, S. 107, S. 107 Amendment and S.J. Res. 18 Before the Senate Comm. on Interior and Insular Affairs*, 83d Cong., 1st Sess. 137-162 (1953). And the Senator acknowledged that the United States was only claiming "artificially filled land." *Id.* at 193.

ings on S.J. Res. 13, etc., Before the Senate Comm. on Interior and Insular Affairs, supra n.10, at 935. In his words (*id.* at 926) the combined effect of Section 1301(a)(3) and Section 1313(a) was:

> to make certain that all installations by the States on submerged, reclaimed, or filled or other lands inside the line, belong to the States subject to the navigation servitude; also that all installations and acquisitions of the Federal Government within such area belong to it.

2. More significantly, California addresses our assertion that Section 5 of the Act expressly confirms to the United States "accretions" to retained federal coastal upland. See U.S. Op. Br. 16-17; U.S. Rep. Br. 3. The State's answer here is that only such accretions as *State* law recognizes are covered. Cal. Rep. Br. 14-15. Why such a principle should obtain is not remotely suggested. Nor can we appreciate what would motivate a Congress intent on protecting the federal interest in maintaining its coastal installations, and presumably their access to the sea, to subject such areas to a State law rule that might deny these lands their riparian value. There is, on the contrary, every reason here to read "accretions" as referring to additions so treated by federal law.

No different indication is given in the discrete provisions of Section 5 and Section 3 (43 U.S.C. 1311(a)) mentioning "State law." In the first instance, the Act exempts "all lands which the United States holds under the law of the State." 43 U.S.C. 1313(a). But that is obviously not a qualification of the other categories of exempted lands. Suffice it to ask whether the effectiveness of federal title to lands acquired by the United States from a private landowner "by eminent domain proceedings" depends upon State law?

Equally irrelevant is the cited provision of Section 3, which confirms title in "the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located."

43 U.S.C. 1311(a). That Congress quite naturally deferred to State law as to the *proper beneficiary* of the grant is hardly evidence that State law was intended to control the *scope* of the grant itself.

If these exceptional references to State law show anything, it is that Congress knew how to make clear when the uniform federal rule would not apply. The normal principle, as one would expect in a federal statute of nationwide application which sought to treat all States on an "equal footing," is that the terms used are to have the same meaning everywhere and, unless otherwise indicated, the settled meaning known to the law of the United States. Nor would this be an unusual or unfamiliar doctrine so far as "accretion" was concerned. As California was at pains to point out to this Court in 1952, the so-called "Federal rule"—treating alike all gradual accretion, irrespective of cause—was the standard, imported from English common law, repeatedly declared by this Court, and followed in the great majority of States. See California's Brief in Relation to Report of Special Master of May 22, 1951, *supra*, at 90-91 (Appendix, *infra*, 2a-3a). We may safely assume everyone understood that the Submerged Lands Act was confirming federal title to all accretion attached to uplands reserved by the United States, whether or not the natural forces that produced it had been deflected by artificial structures.

E. CONCLUSION

At issue is an area of fast lands fronting on the Pacific Ocean, all above the high water line, which long ago became attached to a coastal federal enclave, expressly set aside for more than a century as a Coast Guard Reservation. It would be an extraordinary rule that detached this parcel as State land and deprived the United States of its access to the sea, especially when no action or expenditure by the State had any part in creating the new land and the State has suffered no net loss of territory if the accretions are conceded to the United States. The law, to be sure, does not always do equity or

follow common sense. But, at some point, the law rebels at being made to look the fool. This is such a case.

In responding to California's ingenious fictions, our objective has been to rescue the Equal Footing Doctrine and the Submerged Lands Act from absurdity. At the end of the day, our submission is that both the Constitution and the Act of Congress announce a clear, workable and equitable rule, consistent with the wisdom of the common law and the law of nations. It is this: that, except in very special circumstances where the seabed has been artificially built up by improvements made by the State or under its authority, legal boundaries along the open coast follow geographic reality, regardless of cause. We may doubt whether California is free to alter this simple principle to its advantage in defining the littoral rights of its own citizens. Arguably, that is not our affair. We are clear, however, that the State may not invoke the Equal Footing Doctrine or the Submerged Lands Act to this end, and that no other constitutional principle condones any expansion of the rule to deprive the United States of benefits appertaining to the national sovereign.

For the reasons stated here and in prior briefs, judgment should be entered quieting the title of the United States to the parcel in suit.

Respectfully submitted.

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